Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

DALE LINCOLN DUKE,
Petitioner,

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misapplied the requirement of *Brady v. United States*, 397 U.S. 742 (1970) that a trial court inform a defendant entering a plea of the "direct consequences" of the plea by labeling what was clearly a direct consequence of the plea a collateral consequence of the plea.

PARTIES TO THE PROCEEDINGS

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QUESTION FOR REVIEW

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Petitioner, Dale Lincoln Duke, hereby petitions for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit entered on May 21, 2002, petition for rehearing denied June 17, 2002, denying Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner alleged in his 28 U.S.C. §2254 petition a violation of his constitutional right to due process in that his plea of nolo contendere to the offense of aggravated sexual assault of a child was not entered voluntarily, knowingly, or intelligently.

DECISION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's petition for a writ of habeas corpus is styled:

> *Dale Lincoln Duke v. Janie Cockrell, Director*, Texas Department of Criminal Justice, Institutional Division No. 01-10232

The decision of the Court of Appeals is dated May 21, 2002, and is unpublished. A copy of the decision is attached to this Petition in Appendix A.

The order of the Court of Appeals denying Petitioner's petition for rehearing is dated June 17, 2002, and is attached to this Petition in Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for a writ of habeas corpus on May 21, 2002. Petitioner's petition for rehearing was

denied on June 17, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U. S. CONST. amend. XIV:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Petitioner was charged by indictment with the offense of aggravated sexual assault of a child. (Vol. 1, p. 45). [1] On August 10, 1992, Petitioner appeared in the 291st District Court of Dallas County, Texas, waived his right to a jury trial, and entered a plea of nolo contendere to the indictment. (Vol. 1, pp. 64-65). The court found the evidence sufficient to substantiate Petitioner's guilt but withheld adjudication of guilt. (Vol. 1, p. 72). Petitioner was placed on probation for a period of ten (10) years and he was ordered to pay a fine of $750.00. (Vol. 1, p. 72).

On July 14, 1997, the State filed a Motion to Proceed with Adjudication of Guilt alleging that Petitioner violated one

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[1] The references to Vol. and Doc. throughout this Petition refer to the record on appeal in the court below.

of the conditions of his probation. (Vol. 1, p. 83). On November 25, 1997, following a hearing on that motion, the Court adjudicated Petitioner's guilt of the offense of aggravated sexual assault of a child. (Vol. 1, p. 170). The Court assessed Petitioner's punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for twenty (20) years. (Vol. 1, pp. 41-43; 171).

Petitioner did not give notice of appeal from the Judgment Adjudicating Guilt.

On April 20, 1998, Petitioner filed an Application for Post-Conviction Writ of Habeas Corpus in the 291st District Court of Dallas County, Texas. (Vol. 2, pp. 254, et. seq.). On July 15, 1998, the 291st District Court entered Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus finding that an evidentiary hearing was not necessary on Petitioner's Application and recommending that the relief Petitioner requested be denied. (Vol. 1, pp. 208-213).

On July 21, 1998, Petitioner filed his Objections to Trial Court's Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus. (Vol. 1, pp. 214-221). On October 14, 1998, the Texas Court of Criminal Appeals remanded Petitioner's Application to the state trial court for an evidentiary hearing. (Vol. 1, pp. 221-224).

On December 18, 1998, the state trial court held the evidentiary hearing ordered by the Texas Court of Criminal Appeals. (Vol. 2, pp. 226-319). Following that hearing, the trial court entered Supplemental Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus once again recommending that Petitioner's Application be denied. (Vol. 2, pp. 320-323).

Petitioner filed Objections to Trial Court's Supplemental Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus. (Vol. 2, pp. 324-328). On March 22, 1999, however, the Texas Court of Criminal Appeals denied Petitioner's Application "on the findings of the trial court without a hearing." (Vol. 2, p. 329). No motion for rehearing was filed in the Court of Criminal Appeals.

On October 13, 1999, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody in the United States District Court for the Northern District of Texas. (Vol. 1, pp. 1-39). On October 23, 2000, the United States Magistrate Judge recommended that all relief requested by Petitioner be denied. (*see* Appendix C). Petitioner filed objections to the Magistrate Judge's recommendation. (Vol. 2, pp. 537-545). On January 17, 2001, the United States District Judge adopted, with some additional comments, the Magistrate Judge's findings and denied Petitioner the relief he requested. (*see* Appendix D). On April 16, 2001, in response to Petitioner's timely filed notice of appeal and request for certificate of appealability, the United States District Judge granted Petitioner a certificate of appealability as to two issues. (Supp., pp. 5-6).

On May 21, 2002, the Court of Appeals for the Fifth Circuit affirmed the District Judge's denial of Petitioner's petition for a writ of habeas corpus. (See Appendix A). On June 17, 2002, the Court of Appeals denied Petitioner's petition for rehearing. (See Appendix B).

Question for Review

Whether the Court of Appeals misapplied the requirement of *Brady v. United States*, 397 U.S. 742 (1970)

that a trial court inform a defendant entering a plea of the "direct consequences" of the plea by labeling what was clearly a direct consequence of the plea a collateral consequence of the plea.

Reasons for Granting the Writ

A. General Principles

A plea of guilty is constitutionally valid only to the extent that it is "voluntary" and "intelligent." *Brady v. United States*, 397 U.S. 742, 747-48, 90 S.Ct. 1463, 1468-69, 25 L.Ed.2d 747 (1970). As this Court explained in *Brady*:

> But the plea is more than the admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent, acts done with sufficient awareness of the relevant circumstances and likely consequences.

Id., 397 U.S. at 748, 90 S.Ct. at 1469 (footnote omitted); also see, *Diaz v. Martin*, 718 F.2d 1372, 1376-77 (5th Cir. 1983). "Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969)(footnote omitted). The record should affirmatively reflect that the defendant entered the plea freely and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 241-42, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969).

In general, the law governing guilty pleas applies with equal force to a nolo contendere plea. *See*, *Matthew v. Johnson*, 201 F.3d 353, 360 n. 9 (5th Cir. 2000); *Carter v. Collins*, 918 F.2d 1198, 1200 n. 1 (5th Cir. 1990). Petitioner's nolo contendere plea is, therefore, constitutionally valid only if it was entered voluntarily, knowingly, and intelligently.

B. Standard of Review

28 U.S.C. §2254(d) establishes the following standard of review for collateral review of state-court convictions:

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

A decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme] Court

has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). A decision is an unreasonable application of federal law "if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Factual findings of the state court are presumed to be correct and must therefore be shown deference "unless they were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000).

C. The State Proceedings

On April 10, 1992, Petitioner was arrested for the offense of aggravated sexual assault of a child. (Vol. 1, p. 16). Following his arrest, Petitioner consistently and vehemently maintained his innocence of the accusation leveled against him. Petitioner asked his attorney to set his case for trial. (Vol. 1, p. 16).

As the jury trial date approached, Petitioner's attorney tried to persuade him to plead guilty in exchange for a plea bargain recommendation from the State for deferred adjudication probation. Petitioner refused to accept the offer. He was unwilling to plead guilty to an offense he did not commit. (Vol. 1, p. 16).

Shortly before trial, Petitioner's attorney approached him with a plea bargain offer for deferred adjudication probation in exchange for a nolo contendere plea rather than a guilty plea. The attorney explained to Petitioner that by pleading nolo contendere he would not be admitting his guilt, he would only be acknowledging the charge against him, not agreeing with it. The attorney urged Petitioner to accept the

offer in order to avoid the risk of going to prison should he lose a trial. (Vol. 1, p. 17).

After sitting in jail almost four months, waiting for trial, Petitioner was anxious to get out of jail and he was not so keen on the thought of going to prison. Petitioner told his attorney he would accept the State's plea bargain offer in exchange for a nolo contendere plea as long as he would not have to admit sexually assaulting the complainant. Petitioner's attorney assured him he would not have to admit guilt of something he did not do. (Vol. 1, p. 17).

Petitioner was told by his attorney that one of the conditions of his deferred adjudication probation would be to participate in and successfully complete a sex offender counseling program. It was not explained to Petitioner, by his attorney or anyone else, however, that the successful completion of such a program would depend on Petitioner admitting responsibility for sexually assaulting the complainant. Petitioner would not have entered a nolo contendere plea if he had known of this condition of counseling and if he had known that failure to comply with the condition would result in an adjudication of Petitioner's guilt. (Vol. 2, pp. 332-333).

On August 10, 1992, Petitioner appeared in court, waived his right to a jury trial, and entered a plea of nolo contendere to the indictment pending against him. In connection with that plea, Petitioner entered into a stipulation that if the complainant were called to testify that she would testify to the allegations in the indictment. (Vol. 2, p. 334). The stipulation of the complainant's testimony was the only evidence admitted in support of Petitioner's plea. The complainant did not personally testify at the plea hearing. Petitioner testified at the plea hearing but did not make a

judicial confession of his guilt. Petitioner did not, in any manner, admit the allegations in the indictment. (Vol. 1, pp. 63-74).

On July 14, 1997, the State filed a Motion to Proceed with an Adjudication of Guilt alleging that Petitioner violated his probation by failing to successfully complete a sex offender treatment program as required by condition "o" of an Order Modifying Conditions of Probation signed on February 14, 1997. Petitioner entered a plea of "not true" to the State's motion and proceeded to a hearing before the court. The State presented testimony at that hearing that Petitioner was discharged from the sex offender treatment program he was attending because Petitioner would not comply with the program requirements. Petitioner's failure was his refusal to take responsibility for the sexual assault of the complainant. In fact, Jennifer Poehlman of the Adapt Health Care program testified at the hearing on the State's motion that "The sex offender treatment program and sex offender treatment in general is predicated on the client taking responsibility for his sex offenses. No progress or treatment can be done or made until the client does that." (Vol. 1, p. 90).

Even though Petitioner never missed a class after he was ordered by the court to participate in the treatment program, Petitioner was discharged from the program for failure to comply with its requirements. (Vol. 1, p. 98).

The court found the allegation in the State's Motion to Proceed with an Adjudication of Guilt to be true. The court then found Petitioner guilty of the offense of aggravated sexual assault of a child and assessed Petitioner's punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for twenty (20) years. (Vol. 1, pp. 170-172).

Petitioner challenged his conviction and prison sentence in a state application for a writ of habeas corpus. The State habeas corpus recognized that for a nolo contendere plea to be valid it must be voluntarily and knowingly entered. (Vol. 1, p. 210). The State court, however, then concluded that Petitioner's plea was voluntarily and knowingly entered without making any finding as to whether Petitioner was told that in order to successfully complete sex offender counseling and, consequently, in order to successfully complete probation, he would have to admit his guilt of the offense of which he was accused.

D. The Fifth Circuit

The Fifth Circuit, like the state habeas court, recognized that for Petitioner's plea to be valid it must have been "knowingly, voluntarily, and intelligently made." *Duke v. Cockrell*, No. 01-10232 (5th Cir. May 21, 2002), p. 4. According to the Fifth Circuit, a plea is knowingly, voluntarily, and intelligently made as long as the defendant was informed of the "direct consequences of the plea." *Id.* The Fifth Circuit then labels the requirement that Petitioner admit his guilt as part of the counseling program he was ordered to attend as a condition of probation a collateral and not a direct consequence of the plea. *Id.* at 4-5. As such, in the Fifth Circuit's view, it does not matter that Petitioner was not advised of that requirement when he entered his plea. Petitioner's plea was knowingly and voluntarily made absent that knowledge.

E. Direct or Collateral Consequence

The Fifth Circuit takes the position that successful completion of sex offender counseling is a collateral and not a direct consequence of Petitioner's plea and thus knowledge

of that consequence cannot affect the voluntariness of the plea. This, of course, is wrong because sex offender counseling was a relevant circumstance of Petitioner's plea about which Petitioner should have been fully admonished.

The state habeas court correctly found that sex offender counseling was a part of Petitioner's plea agreement. (Vol. 1, p. 210). This and the fact that sex offender counseling is required as a condition of probation for a child sex offense (*See*, TEX. CODE CRIM. PROC. ANN. art. 42.12 Sec. 13B(a)(2)) establishes that the counseling was a very relevant, direct consequence of Petitioner's plea. It is inherently contradictory to find that sex offender counseling was part of Petitioner's plea bargain agreement but to then assert, as does the Fifth Circuit, that the requirement that Petitioner admit his guilt to successfully complete the counseling and thus his probation is merely a collateral consequence of Petitioner's plea. Clearly, Petitioner should have been told that the likely consequence of refusing to admit guilt of something he did not do was that his probation would be revoked for failure to successfully complete the counseling that was part of his plea bargain agreement.

When Petitioner entered his nolo contendere plea, the court, the prosecutor, and his own attorney all made a commitment to him that he would not be required to admit guilt of the offense of aggravated sexual assault of a child by allowing Petitioner to plead nolo contendere rather than guilty to that offense. In fact, the whole purpose of entering a nolo contendere plea was to resolve the case against Petitioner without an admission of guilt. Petitioner was never told that failure to admit guilt would result in the direct consequence of his probation being revoked.

A collateral consequence of a plea should be limited to a consequence within the control of an agency or entity other than the court accepting the plea. *See, e.g. Moore v. Hinton*, 513 F.2d 781, 782-83 (5th Cir. 1975) (defendant need not be told driver's license would be suspended by Dept. of Public Safety); *Wadley v. Davis*, 445 F.2d 1, 3 (5th Cir. 1971) (defendant need not be told he would be struck from local voting rolls); *United States v. Gavilan*, 761 F.2d 226, 228-29 (5th Cir. 1985) (defendant need not be told that INS might deport him).

In Petitioner's case, the sentencing court and not some independent entity or agency set the conditions of probation and determined whether those conditions were met. The state trial judge placed Petitioner on probation and required Petitioner as a condition of probation to attend sex offender counseling. The state judge held the power to decide whether Petitioner was in or out of compliance with his probation conditions. By not advising Petitioner that he would have to admit guilt of the offense to which he entered a nolo contendere plea in order to successfully complete sex offender counseling and ultimately his probation, the trial judge set Petitioner up for a sure and automatic revocation of his probation. This was certainly a direct consequence of Petitioner's plea, but, more importantly, it was a relevant circumstance of the plea of which Petitioner should have been told.

The failure of the trial court or anyone else to tell Petitioner of the highly relevant circumstance of his plea that he would have to admit guilt or go to prison rendered Petitioner's plea involuntary, unknowing, and unintelligent and resulted in the entirely foreseeable consequence of the revocation of Petitioner's probation.

CONCLUSION

BASED ON THE FOREGOING ARGUMENTS, Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10232

[Decided, May 21, 2002]

DALE LINCOLN DUKE,
Petitioner-Appellant,

vs.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
3:99-CV-2338-D

JUDGES:
Before POLITZ, STEWART, and CLEMENT, Circuit Judges.

OPINION

PER CURIAM:

State prisoner Dale Lincoln Duke appeals the denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254, in which he challenges his conviction pursuant to a plea of *nolo contendere* for aggravated sexual assault of a child younger than fourteen years of age. He complains that because he was not informed that successful completion of a sex offender program would require him to admit his guilt, his *nolo* plea was not voluntarily, knowingly, and intelligently made. Finding the requirement collateral to Duke's plea, we must affirm.

BACKGROUND

Duke was indicted for aggravated sexual assault of a child. He entered a plea of *nolo contendere* to that charge under an agreement that the victim would testify as to the details of the assault. He acknowledged to the court his understanding that his plea would have the same effect from a criminal standpoint as a guilty plea. The trial court found that the evidence substantiated Duke's guilt and ordered him sentenced to ten-years probation with adjudication deferred and a fine of $750. The terms of probation required that he successfully complete a sexual offender treatment program. Five years later, the State, alleging that Duke failed to successfully complete the sexual offender treatment program, moved to proceed with an adjudication of guilt. Duke had been discharged from the treatment program because he refused to admit guilt for the sexual assault. The trial court found Duke guilty of aggravated sexual assault, revoked his probation, and sentenced him to twenty years in prison. Duke

did not appeal the conviction. Instead, he filed an application for writ of habeas corpus in state court, which was denied. He followed that denial with the instant action.

ANALYSIS

Under § 2254, federal courts will not grant an application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court unless the proceedings resulted in a decision that was either: (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. [1] To be unreasonable under § 2254 a state court's application of clearly established federal law must be objectively unreasonable, not merely incorrect or erroneous. [2] Otherwise, the state court's factual determinations are entitled to a presumption of correctness, and the petitioner bears the burden of rebutting that presumption by clear and convincing evidence. [3]

Duke complains that his *nolo contendere* plea was not freely, voluntarily, and intelligently made because he was not informed that successful completion of a treatment program depended upon his admitting the sexual assault. He concedes

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[1] 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 411-12, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).

[2] *Id.* at 409, 412.

[3] 28 U.S.C. § 2254(e)(1).

that he agreed to attend counseling as part of his probation, but insists that there is a "big difference" between the knowledge that he must attend counseling and the knowledge that he must admit guilt as part of that counseling. Under Texas law, a plea of *nolo contendere* has the same effect as a guilty plea [4] and, therefore, must be knowingly, voluntarily, and intelligently made. [5] This requires that the defendant be informed of the consequences of his plea, however, "the defendant need only understand the direct consequences of the plea; he need not be made aware of every consequence that, absent a plea of guilty, would not otherwise occur." [6] Duke maintains that the requirement that he admit his guilt as part of counseling was a direct consequence of the plea. We are not persuaded.

In *Hobbs v. Blackburn* we explained that the direct consequences of a defendant's plea are the immediate and automatic consequences of that plea such as the maximum sentence length or fine. [7] The direct consequences of Duke's

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[4] *Matthew v. Johnson*, 201 F.3d 353, 360 n. 9 (5th Cir. 2000), *cert. denied*, 531 U.S. 830, 148 L. Ed. 2d 44, 121 S. Ct. 291 (2000) (citing TEX. CODE CRIM. P. art. 27.02(5)).

[5] *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970); *Hobbs v. Blackburn*, 752 F.2d 1079, 1081 (5th Cir. 1985).

[6] *United States v. Hernandez*, 234 F.3d 252, 255 (5th Cir. 2000).

[7] *See, e.g.*, *Hobbs*, 752 F.2d at 1082 (holding that the requirement that defendant be informed are satisfied if the defendant was informed of the maximum term of imprisonment);

plea were that he would be fined and required to attend treatment, and if he failed to successfully complete his treatment he would have to serve his deferred sentence. On the other hand, as recognized by the Seventh Circuit Court of Appeals in *Warren v. Richland County Circuit Court*, [8] the condition that a defendant admit his guilt as part of a required rehabilitation program is a collateral consequence. [9] Accordingly, the consequence of which Duke complains is merely incidental to what he clearly knew, understood and accepted as the consequences of his plea. The revocation was not immediate in either time or impact because it was contingent upon intervening circumstances, and it was not automatic because the ability to abide by the probation conditions was within Duke's control. [10] In addition, even if today we were to declare the requirement that Duke admit his guilt during his rehabilitation a direct consequence of his plea, he has failed to demonstrate that this was clearly established

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Hernandez, 234 F.3d at 256 (explaining that "consequences no matter how unpalatable which are not related to the length or nature of the federal sentence cannot be considered direct consequences").

[8] *223 F.3d 454 (7th Cir. 2000), cert. denied*, 531 U.S. 1168, 148 L. Ed. 2d 999, 121 S. Ct. 1133 (2001).

[9] 223 F.3d at 458 (holding that the possibility that a defendant's probation might be revoked due to his refusal to admit guilt during counseling was not a direct consequence of his sentence).

[10] *See, e.g.*, 223 F.3d at 457 (citing *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 579 N.W.2d 698, 708-09 (Wisc. 1998)).

federal law at the time of his plea or the state court decision was based on an unreasonable determination of the facts.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10232

[Filed, June 17, 2002]

DALE LINCOLN DUKE,
Petitioner-Appellant,

vs.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Dallas

JUDGES:
Before POLITZ, STEWART, and CLEMENT, Circuit Judges. *

* Due to his death on May 25, 2002, Judge Politz did not participate in this decision.

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/_____
Carl E. Stewart
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3:99-CV-2338-D

[FILED OCTOBER 23, 2000]

DALE LINCOLN DUKE	)
ID# 811885	)
Petitioner,	)
	)
v.	)
	)
GARY JOHNSON, Director	)
Texas Department of Criminal	)
Justice, Institutional Division)	
Respondent.	)
	)

FINDINGS, CONCLUSIONS AND
RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b) and an Order of the Court in implementation thereof, subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions, and recommendation of the Magistrate Judge, as evidenced by her signature hereto, are as follows:

Findings, Conclusions, and Recommendation by the United States Magistrate Judge - 10/23/00

FINDINGS AND CONCLUSIONS

I. Background

Nature of the case: This is a petition for habeas corpus relief filed by a state inmate pursuant to 28 U.S.C. § 2254.

Parties: Petitioner is an inmate currently incarcerated in Fort Stockton Unit of the Texas Department of Criminal Justice-Institutional Division (TDCJ-ID). Respondent is Gary L. Johnson, Director of TDCJ-ID.

Procedural History: In January 1992, the state indicted petitioner for aggravated sexual assault of a child younger than fourteen years of age. True Bill of Indictment, attached as Ex. B to App. I to Pet. Writ of Habeas Corpus (Pet.). The complainant is petitioner's former step-daughter. Ex parte Duke No. 38,448-01 at 119. On August 10, 1992, petitioner pled no contest or *nolo contendere* to the single charge in the indictment. *Id.* at 33-34. He entered into a plea bargain with the state so as to receive a sentence of "ten years deferred adjudication probation and a fine of $750." *Id.* at 37. He understood that his plea would have the "same effect from a criminal view point" as a guilty plea. *Id.* at 34. The court accepted the plea bargain after assuring itself that petitioner understood the bargain. *Id.* at 38. It found petitioner "fully aware of the consequences of his plea" and placed him on ten years deferred adjudication. *Id.* at 42.

On July 14, 1997, the state moved to proceed with an adjudication of guilt. *Id.* at 201. It alleged that the petitioner violated "condition (o) [of his probation] in that he failed to

faithfully participate in recommended sex offender treatment. . . and was discharged from said treatment. . . for his failure to take the required steps to lower his risk to children within the community." *Id.* On November 25, 1997, the court conducted a hearing on the state's motion. *Id.* at 52. Petitioner pled not true to the allegation. *Id.* at 53. After taking testimony on the allegation, the court revoked his probation and sentenced him to twenty years imprisonment. *Id.* at 139-40.

Petitioner did not appeal the conviction. Pet. at ¶ 8. On April 20, 1998, he instead challenged his conviction by filing a state habeas application pursuant to TEX. CODE CRIM. PROC. art. 11.07. Ex parte Duke No. 38,448-01 at 2. On October 14, 1998, the Court of Criminal Appeals remanded the case for an evidentiary hearing on petitioner's actual innocence claim. *See* Pet.'s App., Vol I at Ex. F. On December 18, 1998, the trial court convened an evidentiary hearing to comply with the directive of the Court of Criminal Appeals. Following the evidentiary hearing, the trial judge entered Supplemental Findings of Fact and Conclusions of Law recommending that the petition be denied. *Id.* at H. On March 17, 1999, the Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without hearing. Ex. parte Duke No. 38448-01 at cover.

On October 13, 1999, petitioner filed the instant petition for federal habeas relief challenging the judgment of conviction and sentence imposed by the trial court. Pet. at 3. On January 20, 2000, respondent filed an answer with brief

in support and furnished the state court records. On February 4, 2000, petitioner filed a reply to the answer.

Substantive Issues: Petitioner asserts three bases for relief: (1) actual innocence of the crime convicted; (2) he did not enter his plea of *nolo contendere* voluntarily, knowingly, intelligently; and (3) the revocation of his probation and the adjudication of his guilt violated his rights to due process. He raised each of these issues in his state court petition. Ex. Parte Duke No. 38,448-01 at 3-4.

Exhaustion: Respondent concedes that petition has exhausted all state remedies for the claims raised in the instant petition.

II. Analysis

Heightened Standard of Review Under AEDPA: On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1217. Title I of the Act substantially changed the way federal courts handle habeas corpus actions. It applies to all federal petitions for habeas corpus filed on or after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Petitioner filed the instant petition after the effective date of AEDPA. Title I of the Act thus applies to his petition.

Under 28 U.S.C § 2254 (d), as amended by the AEDPA, a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in State court proceedings, unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In the past year, the United States Supreme Court and the Fifth Circuit Court of Appeals have commented on these standards. *See Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1495 (2000); *Penry v. Johnson*, 215 F.3d 504 (5th Cir. 2000); *Chambers v. Johnson*, 218 F.3d 360 (5th Cir. 2000) (as modified on denial of rehearing), *reh'g denied*, 2000 WL 1014621 (5th Cir. July 24, 2000); *Hill v. Johnson*, 210 F.3d 481 (5th Cir. 2000).

Section 2254 (d) (1) concerns pure questions of law and mixed questions of law and fact. *Penry*, 215 F.3d at 507. "[A] decision is contrary to clearly established Federal law 'if the state court arrives at a conclusion opposite to that reached by the [Supreme Court] on a question of law, or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.'" *Chambers*, 218 F.3d at 363 (quoting *Williams*, ___ U.S. at ___, 120 S. Ct. at 1523).

> A state court unreasonably applies Supreme Court precedent if: (1) it unreasonably applies the correct legal rule to the facts of a particular

> case or (2) it 'unreasonably extends a legal principal from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principal to a new context where it should apply.'

Penry, 215 F.3d at 507-08 (quoting *Williams*, ___ U.S. at ___, 120 S. Ct. at 1520). The standard for determining "whether a state court's application was unreasonable" is an objective one. *Id.* at 508.

Section 2254 (d)(2) concerns questions of fact. Upon finding compliance with 28 U.S.C. § 2254 (d)(1), federal courts "give deference to the state court's findings" unless the findings violate § 2254(d)(2). *Chambers*, 218 F.3d at 363 (quoting *Williams*, ___ U.S. at ___, 120 S. Ct. at 1523). *Hill v. Johnson*, 210 F.3d at 481, 485 (5th Cir. 2000). The resolution of factual issues by the state court is presumptively correct, furthermore, and will not be disturbed unless the state prisoner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1); *see also, Sumner v. Mata,* 449 U.S. 539 (1981).

Examination of the Issues:

A. Actual Innocence:

Petitioner claims that newly discovered evidence establishes that he is actually innocent of the crime to which he pled *nolo contendere*. Respondent counters that actual innocence cannot serve as an independent basis for federal habeas relief. The Court agrees.

Petitioner cites *Herrera v. Collins*, 506 U.S. 390 (1993) and *Schlup v. Delo*, 513 U.S. 298 (1995), to bolster his position that actual innocence may serve as an independent basis for habeas corpus relief. Mem. in Supp. of Pet. at 12-16. Neither of those cases, however, support his argument.

Herrera involved a death row inmate's novel claim that the execution of an innocent person would violate the Eighth Amendment even if the proceedings that had resulted in his conviction and sentence were wholly fair and error free. *See Schulp*, 513 U.S. at 313. In reviewing the petitioner's claim, the Supreme Court recited the entrenched habeas principle:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact. *Herrera*, 506 U.S. at 400.

At the end of its opinion, however, the Court observed

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and

> warrant federal habeas corpus relief if there were no state avenue open to process such a claim. *Id.* at 417.

Despite the pronouncement at the end of its opinion, the Supreme Court did not find in *Herrera* and has not found since *Herrera* that a claim of actual innocence constitutes an independent ground for federal habeas corpus relief. *Lucas v. Johnson,* 132 F.3d 1069, 1075 (5th Cir. 1998) (citing *Herrera*, 417 F.2d at 426). Rather the Court found that the petitioner's evidence of innocence fell short of the high standard that would necessarily apply if an independent claim of actual innocence were recognized on federal habeas review. *Herrera*, 506 U.S. 416-418.

With respect to whether a petitioner may obtain federal habeas relief on a claim of actual innocence, the Fifth Circuit recognizes *Townsend v. Sain*, 372 U.S. 293 (1963) as stating the unequivocal position of the United States Supreme Court on the matter. *See Boyd v. Puckett*, 905 F2d 895 (1990); *Armstead v. Maggio*, 720 F.2d 894,896 (5th Cir. 1983) (per curiam). In *Townsend*, the Court held that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." 372 U.S. at 317, *overruled in part on other grounds, Keebey v. Tamayo-Reyes*, 504 U.S. 1 (1992). The Fifth Circuit has reaffirmed *Boyd* since the Supreme Court decided *Herrera*. *See Lucas*, 132 F.3d at 1075 ("*Herrera* does not overrule previous holdings (nor draw them into doubt) that a claim of actual innocence based on newly discovered evidence fails to state a claim in federal habeas corpus");

Jacobs v. Scott, 31 F.3d 1319, 1324 (5th Cir. 1994) (*Herrera* does not affect the precedential value of *Boyd*.")

In *Schulp*, the Supreme Court recognized the distinction between claims in which actual innocence stands alone as a claim for relief (*Herrera*) from claims where actual innocence serves as a "'gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits'" (*Schulp*). *Lucas*, 132 F.3d at 1076-77 (citing *Schulp*, 513 U.S. 315). *Schulp* involved a petitioner who was seeking federal habeas review of procedurally barred claims by claiming he was actually innocent of the crime of conviction. The Supreme Court held that a petitioner seeking to surmount a procedural bar to consideration of habeas claims based on a claim of actual innocence must establish "that it is more likely that not that no reasonable juror would have found [him] guilty beyond a reasonable doubt. . . in light of the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenable claimed to have been wrongly excluded or to have become available only after the trial." *Schulp*, 513 F.3d at 321. *Schulp* did not change the settled law that actual innocence is not an independent basis for federal habeas relief. *e.g., Graham v. Johnson*, 168 F3d. 762, 788 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1830 (2000); *Lucas*, 132 F.3d at 1075.

Here, petitioner does not present any procedurally barred claims, thus his reliance on *Schulp* is misplaced. That leave the *Herrera* case for support which, under the present state of the Fifth Circuit and Supreme Court authority, us unavailing. Petitioner seems to recognize that the United

States Supreme Court has not recognized actual innocence as an independently cognizable claim for purposes of federal habeas relief. But he urges that the Supreme Court has "hinted that in the right fact situations, it would accept a claim of actual innocence as in independent ground for relief on habeas corpus." Mem. in Supp. of Pet. at 13-14. In view of the broad Fifth Circuit pronouncements rejecting this proposition, this court declines to consider petitioner's argument of actual innocence and recommends that the District Court deny this claim.

B. Validity of Plea

Petitioner claims that his plea was involuntary because his attorney told him that by entering it, he would not be required to admit guilt of something that he did not do. He maintains that although he knew that counseling would be a required as a condition of probation, no one told him that successful completion of such counseling would hinge upon admitting the he sexually assaulted his step-daughter. He claims that he would not have agreed to plea had he known of such condition. His trial attorney confirms in an affidavit that petitioner would not have agreed to the plea had he known of that condition. Ex parte Duke No. 38,448-01 at 215-216.

The state court considered the claim that petitioner did not knowingly and voluntarily enter his plea. It found:

> 2. Applicant's plea of *nolo contendere*. . . was accepted by this Court after the Court thoroughly and properly admonished Applicant as to the meaning and consequences of said

> plea. This Court would not have accepted said pleas had this Court not been convinced that Applicant knew and understood the consequences of said plea. Applicant's plea was made and accepted in accordance with the requirements of Article 26.13, V.A.C.C.P. Applicant's plea of *nolo contendere* was knowingly and voluntarily entered.
>
> 3. The statement of facts. . . reflects that as part of the plea bargain agreement, Applicant agreed to attend sex offenders counseling. Clearly as part of such counseling, a person must admit that the person needs counseling. Ex parte Duke No. 38,448-01 at 219 (citations omitted). As mentioned previously, after a remand for a hearing on the actual innocence claim, the Court of Criminal Appeals denied the state court petition on the merits. Ex parte Duke No. 38,448-01 at cover.

A plea of guilty or *nolo contendere* waives a number of constitutional rights. [1] *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); *Joseph v. Butler*, 838 F.2d 786,789 (5th Cir. 1988). Such a plea "is constitutionally valid only to the extent

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[1] In general the law applicable to guilty pleas is equally applicable to pleas of *nolo contendere*. *Matthew v. Johnson*, 201 F.3d 353, 360 n.9 (5th Cir.) *cert. denied* ____ S. Ct. ___ No. 99-9224, 2000 WL 522587(2000); *Carter v. Collins*, 918 F.2d 1198, 1200 n.1 (5th Cir. 1990). The court thus makes no distinction between the type of plea when citing cases.

it is 'voluntary' and 'intelligent.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). The Fourteenth Amendment Due Process Clause imposes these requirements. *Fischer v. Wainwright*, 584 F.2d 691, 692 (5th Cir. 1978) (citing *Brady*, 397 U.S. at 742; *Boykin*, 395 U.S. 238; *Johnson v. Zerbst*, 304 U.S. 458(1938)). "The voluntariness of a plea is determined by 'considering all of the relevant circumstances surrounding it.' *Id.* (quoting *Brady*, 397 U.S. at 749). A plea qualifies as intelligent, furthermore, when the criminal defendant enters it after receiving 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley*, 523 U.S. at 618 (quoting *Smith v. O'Grady*, 312, U.S. 329, 334 (1941)). "When considering challenges to. . . plea proceedings, [the courts] have focused on three core concerns: absence of coercion, the defendant's understanding of the charges, and a realistic understanding of the consequences of [the] plea." *United States v. Garcia*, 983 f.2d 625, 627-28 (5th Cir. 1993).

The record shows that petitioner was properly admonished. With respect to his plea, he signed a form entitled "Court's Admonition of Statutory and Constitutional Rights and Defendant's Acknowledgment." Ex. parte Duke No. 38,448-01 at 199 (stating "You are charged with the crime of Agg. Sex Assault Child and the range of punishment is 5-99"). It admonishes that recommendations of punishment do not bind the court, but the court will follow the plea agreement, if able, and, if unable to do so, the court will allow petitioner to withdraw the plea. *Id.* ¶ 2. The form admonishes that petitioner cannot appeal without permission

of the court, unless the court imposes a punishment greater than the one agreed to by the petitioner. *Id.* ¶ 3. It further admonishes petitioner about consequences relating to not being a United States citizen, rights he has if he has court-appointed counsel, and consequences relating to the impact that violations of probation has on deferred adjudications. *Id.* ¶¶ 4-6. The Acknowledgment section provides: " I have read the above and foregoing admonitions by the Court regarding my rights. I understand the admonitions, and I understand and am aware of the consequences of my plea. Furthermore, my lawyer has explained to me all of the admonitions given by the Court in this document." *Id.* Petitioner also signed a "Stipulation of Testimony" wherein he stipulated to the testimony his former step-daughter would give if called to testify. *Id.* at 202.

Before accepting the plea of the petitioner, the trial court and his attorney also examined petitioner as to it's voluntariness. *Id.* at 33-41. Petitioner indicated that he understood the charge against him. *Id.* at 33. He stated that he understood his plea has "the same effect from a criminal view point" as a plea of guilty. *Id.* at 34. He stated he understood his constitutional rights and the waiver he made. *Id.* at 34-35, 39. He denied being promised anything that caused him to enter the plea. *Id.* at 35. He specifically denied any promise of "some reward", payment of money, or "anything like that." *Id.* His plea was not influenced by fear or force. *Id.* He indicated he "generally" understood the terms and conditions of probation. *Id.* at 40. He specifically stated that he understood that one of the conditions of probation would be that he must undergo counseling. *Id.* at 41. He agreed to accept the terms and conditions placed upon him. *Id.* Indeed,

he signed conditions of probation that required him to "FAITHFULLY PARTICIPATE IN TREATMENT UNLESS SUCCESSFULLY DISCHARGED." *Id.* at 149. He unequivocally stated the he "freely and voluntarily" signed all the plea papers. *Id.* at 41. In view of these statements of the petitioner, the court found him "fully aware of the consequences of his plea." *Id.* at 42.

Sworn testimony in open court carries a strong presumption of verity in a subsequent federal habeas proceeding. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1997). State court records, furthermore, are given a presumption of regularity. *See Bonvillian v. Blackburn*, 780 F.2d 1248, 1252 (5th Cir. 1986); *Webster v. Estelle*, 505 F.2d 926, 929-30 (5th Cir. 1974); *Babb v. Johnson*, 61 F. Supp. 2d 604, 606 (S.D. Tex. 1999). If a petitioner "offers specific factual allegations supported by the affidavit of a reliable third person, [however,] the he is entitled to a hearing on his allegations" that his plea was involuntary, unknowing, or unintelligent. *Rupert v. Johnson*, 79 F. Supp. 2d 680, 703 (W.D. Tex. 1999).

Petitioner alleges that his plea *nolo contendere* is rendered involuntary because his attorney told him that he would not be required to admit guilt for something that he did not do. He points to an affidavit of his trial attorney to support the allegation. Ex parte Duke No. 38,448-01 at 215-216. The affidavit, however, does not indicate that counsel told him he would not have to admit guilt as part of the conditions of his probation. *See id.* Rather, it suggests that such a possibility never crossed counsel's mind. *See id.* The

affidavit does not overcome the strong presumptions associated with sworn testimony and state court records.

The petitioner did not understand that the successful completion of the counseling hinged upon his accepting responsibility for the crime charged does not render his plea involuntary, unknowing, nor unintelligent. Due process simply requires that he understand the "direct consequences" of his plea. *See Brandy v. United States*, 397 U.S. 742, 755 (1970). The requirements imposed for successful completion of his counseling are merely collateral consequences to the plea. *See Warren v. Richard County Cir. Ct.*, 223 F. 3d 454, 458 (7th Cir. 2000) (finding "that the possibility of probation revocation for failure to admit guilt during mandatory counseling is a collateral consequence").

A plea of *nolo contendere* "entered by one fully aware of the direct consequences . . . must stand, unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (*e.g.* bribes)." *See Brandy v. United States*, 397 U.S. 742, 755 (1970). When "deception, an unfulfillable promise, or misrepresentation" induces a plea, the plea is involuntary. *Unites States v. Amaya*, 111 F.3d 386, 389 (5th Cir. 1997).

The record reflects that petitioner has a clear understanding of the proceedings against him, the nature of the offense of which he was charged, and the consequences of entering his plea of *nolo contendere*. Petitioner has not

overcome the presumption of verity accorded solemn declarations made in open court. He has not overcome the presumption of regularity accorded state court records. Given the totality of the circumstances, it is evident that petitioner fully understood the charge against him and the consequences of his plea. Likewise, it is clear that his plea was entered without coercion. The record, furthermore, does not support a claim that a misrepresentation by counsel or anyone else induced his plea. The record does not reflect that the plea was induced by some unkept promise. His plea appears knowing, intelligent, and voluntary.

The state court finding that petitioner entered his plea knowingly and voluntarily appears consistent with the precedent of the United States Supreme Court. It appears to be a reasonable application of such precedent and based upon a reasonable determination of the facts. Consequently, petitioner is entitled to no habeas relief on this claim. *See* 28 U.S.C. § 2254 (d). [2]

B. Due Process Violation

Petitioner argues that the revocation of his probation and the adjudication of his guilt violated his constitutional right to due process. He suggests that due process requires that he be given notice that (1) he had to admit his guilt for

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[2] Petitioner asks this Court to review his contention that his plea was involuntary through the "framework" of his evidence of actual innocence. Mem. in Supp. of Pet. at 16. However, the Court finds no authority indicating that actual innocence is a relevant consideration when reviewing a claim of an infirm plea.

the underlying crime to successfully complete the counseling required as a condition of probation and (2) his probation could be revoked if he failed to admit guilt. He further suggests that it is fundamentally unfair to accept a plea of *nolo contendere* and then require admission of the crime as a condition of probation without adequate notice to him. He also suggests that, under the facts of this case, it is fundamentally unfair to adjudicate guilt for failure to comply with such a condition.

Other than mentioning the alleged due process violation, the trial court does not directly address the allegation. Ex parte Duke No. 38,448-01 at 217-21. It does, however, refer to the "well researched response" of the state. *Id.* at 219. That response indicates that the court could find numerous reasons for revoking the petitioner's probation – only one of which was His refusal to admit guilt. *Id.* at 189. The trial court, furthermore, implicitly finds no due process violation as shown by its denial of the state writ.

"The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610 (1985) (citing *Bearden v. Georgia*, 461 U.S. 660, 666 & n.7 (1983)). "[I]t is clear that the Fourteenth Amendment due process provisions contemplate that any [hearing to revoke probation] must comport with principles of fundamental fairness." *United States v. Tyler*, 605 F.2d 851, 853 (5th Cir. 1979) (citing *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972)).

When a court finds a violation of a condition of probation, its finding must have some "evidentiary support" lest it be found "invalid under the Due Process Clause of the Fourteenth Amendment." *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (holding that a finding "so devoid of evidentiary support" is invalid under the Due Process Clause). The "unforeseeable application" of a condition of probation likewise violates the principle of due process. *Id.*

"[I]t certain circumstances, [furthermore,] fundamental fairness requires consideration of alternatives to incarceration prior to the revocation of probation." *Romano*, 471 U.S. at 614. One such circumstance is when the defendant has violated a condition of probation through no fault of his own. *Bearden*, 461 U.S. at 672. Fundamental fairness, moreover, requires that "the revocation be a rational response to the violation." *Romano*, 471 U.S. at 620 (Marshall, J., concurring). The "touchstone of due process is protection of the individual against arbitrary action of the government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). Any "decision to revoke probation must therefore be rationally justifiable in light of alternative sanctions available and the nature of the underlying violation. This is not a demanding standard given the breadth of reasons that can justify revocation, but it does impose substantive outer boundaries on revocation decisions." *Romano*, 471 U.S. at 624 (Marshall, J., concurring).

Petitioner contends that he lacked notice that he had to admit guilt to successfully complete the counseling required as a condition of his probation and that his probation would be revoked for his failure to admit guilt. It appears that, prior

to the entry of his plea, he had not been informed that he would be required to admit guilt to successfully complete the treatment required as a condition of probation or that his probation could be revoked for failing to do so.

Petitioner, nevertheless, became quite aware of the successful completion of his treatment required that he admit guilt and that his probation could be revoked for his failure to do so. He testified that his first counselor dismissed him from the treatment for such a failure. Ex Parte Duke No. 38,448-01 at 110, 120. His attorney, moreover, told him "several months" before the revocation hearing that he could continue probation, if he admitted the he had committed the offense. *Id.* at 64. Implicit in that conversation lie the facts that he must admit guilt to successfully complete his counseling and that a failure to admit the offense could result in revocation of his probation.

A probationer may obtain constitutionally adequate notice through more than the "bare words of the probation agreement" and directions of the sentencing court. *See United States v. Simmons,* 812 F.2d 561, 566-67 (9th Cir. 1987) (quoting *United States v. Romero*, 676 F.2d 406, 407 (9th Cir. 1982)).

> The meaning of a probation order may be illuminated by the judge's statements, the probation officer's instructions, or other events, any or all of which may assist in completing the notification process in aiding the court to determine whether a probationer

> has been forewarned about what conduct could be deemed to transgress the probation order.

United States v. Gallo, 20 F.3d 7, 13 (1st Cir. 1994). Probationers may obtain sufficient notice through their probation officers. Simmons, 812 F.2d at 566-67. They may likewise obtain sufficient notice through their attorneys.

In this instance, petitioner had adequate notice that he must admit guilt to successfully complete his treatment program and that failure to do so could result in the revocation of his probation. By virtue of the previously mentioned conversation with counsel, petitioner had at least several months notice. The revocation for failure to admit guilt as part of his treatment appears foreseeable to him.

Petitioner claims that he would not have entered into the plea agreement had he known of such condition. Such claim, however, goes to the voluntariness of his plea, not whether he had sufficient notice to comport with due process requirements. The Court has already determined that petitioner entered his plea voluntarily, knowingly and intelligently. It will not revisit the issue here.

Petitioner also suggests that it is fundamentally unfair to accept a plea of *nolo contendere* and then require admission of the crime as a condition of probation without adequate notice to him. The Court has resolved the notice issue against petitioner. His suggestion, nevertheless, appears intertwined with his suggestion that, under the facts of this case, it is fundamentally unfair to adjudicate guilt and thus revoke his probation for a failure to comply with such a condition. The

United States Supreme Court has not addressed whether it is fundamentally unfair to revoke probation under a set of facts materially indistinguishable from those present in this case. The decision of the state court implicitly finding no fundamental unfairness is thus not contrary to any precedent of the United States Supreme Court.

The Supreme Court, however, has recognized that, in certain circumstances, the revocation of probation may be fundamentally unfair and thus a violation of the Due Process Clause of the Fourteenth Amendment. In view of the recognition, this Court must determine whether the state court "unreasonably refuse[d] to extend [Supreme Court precedent] to a new context where it should apply." *See Penry v. Johnson*, 215 F.3d 504,508 (5th Cir. 2000) (quoting *Williams v. Taylor*, ___ U.S. ___, ___, 120 S. Ct. 1495, 1520 (2000)).

In its motion to proceed with an adjudication of guilt, the state alleged that petitioner violated "condition (o) [of his probation] in that he failed to faithfully participate in recommended sex offender treatment. . . and was discharged from said treatment. . . for his failure to take the required steps to lower his risk to children within the community." Ex parte Duke No. 38,448-01 at 201. The Court finds nothing fundamentally unfair about requiring petitioner to faithfully participate in the assigned sex offender treatment despite his plea of no contest or *nolo contendere* and the program's requirements that he accept responsibility for the offense to

successfully complete it. [3] The court's revocation of petitioner's probation appears to be a rational response to his failure to faithfully participate in the counseling required as a condition of probation.

Under the facts of this case, a finding that there was no due process violation in the revocation of petitioner's probation appears consistent with precedent of the United States Supreme Court. It appears to be a reasonable application of such precedent and based upon a reasonable determination of the facts. Petitioner is thus entitled to no habeas relief of this claim. *See* 28 U.S.C. § 2254 (d).

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[3] The Respondent argues that petitioner's failure to comply with other components of his counseling provided alternative bases for revoking his probation. Resp. at 10. Specifically, the treatment of petitioner had seven components or modules: (1) child avoidance; (2) distortions used by sex offenders to justify their behavior; (3) denial and dishonesty, which necessitates "the client to take full responsibility for the offense they were convicted"; (4) deviant sexual arousal the client may have; (5) relapse prevention; (6) victim empathy; (7) anger management. Ex parte Duke No. 38,448-01 at 57-58. Testimony of Jennifer Poehlman, a social worker at the facility providing treatment to the petitioner, reflects that the petitioner "didn't participate in completing any of those modules." *Id.* at 66. According to her, he "didn't complete anything on the treatment plan." *Id.* at 67. The Court is not persuaded by this argument because a view of the records indicates that the thrust of the revocation motion and basis of the resulting revocation was petitioner's refusal to admit his guilt. *Id.* at 45-141.

RECOMMENDATION

For the foregoing reasons, the undersigned Magistrate Judge RECOMMENDS that the Court DENY with prejudice the request for habeas corpus relief brought pursuant to 28 U.S.C. § 2254.

/s/_____
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a copy of these findings, conclusions, and recommendation on all parties by mailing a copy to each of them. Pursuant to 28 U.S.C. § 636 (b)(1), any party who desires to object to these findings, conclusions, or recommendation must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings, conclusions, or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. Failure to file written objections to the proposed findings, conclusions, and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *Douglass v. United Servs. Auto Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

/s/_____
UNITED STATES JUDGE MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3:99-CV-2338-D

[FILED January 17, 2001]

DALE LINCOLN DUKE	)
ID# 811885	)
Petitioner,	)
	)
v.	)
	)
GARY JOHNSON, Director	)
Texas Department of Criminal	)
Justice, Institutional Division)	
Respondent.	)
	)

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered.

It is ORDERED, ADJUDGED, and DECREED that:

1. The request for habeas corpus relief brought pursuant to 28 U.S.C. § 2254 is DENIED with prejudice.

2. The Clerk shall transmit a true copy of this ORDER and the Order adopting the Findings and Recommendation of the United States Magistrate Judge to all parties.

SIGNED this 17th day of January, 2001.

/s/_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3:99-CV-2338-D

[FILED January 17, 2001]

DALE LINCOLN DUKE	)
ID# 811885	)
Petitioner,	)
	)
v.	)
	)
GARY JOHNSON, Director	)
Texas Department of Criminal	)
Justice, Institutional Division)	
Respondent.	)
	)

ORDER

After making an independent review of the pleadings, files, and records in this case, and the October 23, 2000 findings, conclusions, and recommendation of the magistrate judge, the court concludes that the findings and conclusions are correct. It is therefore ordered that the findings, conclusions, and recommendation of the magistrate judge are adopted.

The court adds the following in view of certain objections that petitioner Dale Lincoln Duke ("Duke") makes to the magistrate judge's findings, conclusions, and recommendation.

Duke complains of the finding of the state habeas judge-Judge Meier-that Duke's plea of *nolo contendere* to the offense of Aggravated Sexual Assault, Child Under 14, "was accepted by this Court after this Court thoroughly and properly admonished [Duke] as to the meaning and consequences of said plea" and that "[t]his Court would not have accepted said plea had this Court not been convinced that [Duke] knew and understood the consequences of said plea." Habeas Rec. 219, Find. No. 2. Duke argues that because Judge Cave, a visiting judge, accepted Duke's plea, "[t]he state habeas judge therefore could not have been convinced of anything, she was not even there." Pet. Obj. at 4. He posits that "[t]his finding is thus not entitled to any respect and should not be relied on by the Magistrate Judge." *Id.* Duke's objection is based on a misreading of Judge Meier's finding. Duke pleaded *nolo contendere* to a felony offense pending on the docket of the 291st Judicial District Court of Dallas County, Texas. When Judge Cave took Duke's plea, he was acting as presiding judge of that court. *See e.g.*, Hab. Rec. 25 (reflecting Judge Cave's approval of stipulation of testimony); 27 (reflecting that Judge Cave was sitting for Judge Meier). Judge Meier's finding of fact is not framed in terms of what she personally did in admonishing Duke or whether she personally would or would not have accepted his plea. It is based on the actions and decisions of "this Court," which clearly include those of Judge Cave as presiding judge.

Duke also challenges the magistrate judge's finding that the requirements imposed on him in order to successfully complete counseling were merely collateral consequences to the plea. Pet. Obj. at 4-5; *see* Mag. Rec. at 12. In a very similar case, however, the Seventh Circuit held that "[t]he

possibility that [the habeas petitioner's] probation might be revoked because he refused to admit to sexual contact with a child does not meet [the direct consequences] test." *Warren v. Richland County Circuit Court*, 223 F.3d 454, 457 (7th Cir.), *petition for cert. filed,* (U.S. Nov. 27, 2000) (No. 00-7562). "Direct consequences are the immediate, and automatic consequences of the guilty plea." *Id.* (internal quotation marks omitted) (quoting *United States v. Jordan*, 807 F.2d 1310, 1317 (7th Cir. 1989)).

Duke challenges the magistrate judge's findings concerning the voluntariness of his plea, contending that the record shows he would never have pleaded *nolo contendere* had he known he would be required to admit his guilt. Pet. Obj. at 5-6. Under the voluntariness standard of Brady v. United States, 397 U.S. 742, 755 (1970), the state habeas court's findings that Duke's plea was voluntary are supported by the record. Also supported by the record are the state habeas court's findings that, "as part of the plea bargain agreement, [Duke] agreed to attend sex offenders counseling." Hab. Rec. 219, Find. No. 3. Duke testified during the plea hearing that he generally understood the terms and conditions of probation, *id.* at 40, and understood that, as a condition of probation, he would "be required to undergo certain counseling," and "undergo specifically an examination by psychologists separate and apart from any counseling," *id.* at 41. One of the conditions of probation that Duke acknowledged as part of the plea papers was that he "FAITHFULLY PARTICIPATE IN [PSYCHOLOGICAL] TREATMENT UNTIL SUCCESSFULLY DISCHARGED." *Id.* at 149. The state habeas court had ample basis in the record to find that a person who pleaded *nolo contendere* to the offense of Aggravated Sexual Assault, Child Under 14,

and who agreed as a condition of probation to attend sex offenders counseling, knew that, as part of the counseling, he must admit that he needs counseling.

Duke also maintains that it was extremely unfair, and a violation of due process, to require that he admit guilt of the offense as a condition of probation when he was not required to do so in connection with his plea. Pet. Obj. at 8. [1] Because the record supports the findings and conclusions of the state habeas court that Duke understood the direct consequences of his plea, this argument presents no basis for relief. *See Warren*, 223 F.3d at 457.

The state habeas court's adjudication of Duke's petition neither resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, nor a decision that was based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d). Duke's petition is therefore denied for the reasons stated in the magistrate judge's October 23, 2000 findings, conclusions, and recommendation, as supplemented by this order.

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[1] *But see* Hab. Rec. 35 (emphasis added):

> The Court: Do you understand that by your plea you in essence made *an admission of guilt?*
>
> The Defendant: Yes, sir.
>
> The Court: Do you enter this plea because of that fact and for no other reason?
>
> The Defendant: Yes, sir.

SO ORDERED.

January 17, 2001

/s/_____
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE